SUPREME COURT, U. S.

No. ~~1204~~ 84

APR 7 1967

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In the Supreme Court of the United States

OCTOBER TERM, 1966

MIKE LA JOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Mike LaJoy respectfully prays that a writ of certiorari issue to review the judgment of the Seventh Circuit entered in the above case on January 5, 1967.

OPINIONS BELOW

The opinion of the Court below (Appendix A, page App. 1) is not yet reported. The District Court did not write or hand down any opinion.

JURISDICTION

The judgment of the Court below was entered on January 5, 1967 (Appendix A, p. App. 1). Petition for rehearing by the petitioner was denied March 8, 1967 (Appendix B, p. App. 14). This petition for certiorari is filed within thirty days of the denial of the petition for rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Was it not error to deny the motion to suppress evidence secured by compelling the petitioner, Mike LaJoy, after indictment, and without counsel, to exhibit himself and utter and repeat incriminating phrases in a line-up or show-up held in the F.B.I. headquarters, under a plan by the agents and the prosecutor, at the very time that he was required to be produced before the District Court or a Commissioner under the provisions of Rule 9(c) of F.R.Cr.P.? And was it not error to admit tainted evidence of voice identification derived therefrom as crucial evidence on trial in violation of the Fifth Amendment's prohibition against self-incrimination?

2. Did compulsory exhibition of petitioner Mike LaJoy's physique and voice in said line-up or show-up after indictment, without consultation with any attorney, or the petitioner's expressed consent, violate his Constitutional right to be assisted by counsel at all times in the accusatory stage, *i.e.*, after indictment, as guaranteed by the Sixth Amendment?

3. Did compulsory exhibition of petitioner Mike LaJoy's physique and voice in said line-up or show-up after indictment, in the absence of his attorney, or his expressed con-

sent, and after bail on the indictment had been set for him, but no opportunity to arrange or furnish said bail was afforded, (nor was petitioner informed of the bail set), violate and nullify the petitioner's right to bail under the Eighth Amendment?

4. Do not the technique of using the suppression of an indictment returned on the third day after the bank robbery charged, and a search and seizure in the petitioner's home under the form of a search incidental to an arrest, executed at 5:00 A.M. the morning following return and suppression of the indictment, and the compulsory custody for six or seven hours of interrogation and exhibition, with required speech, of the petitioner to persons, one of whom became crucial witness against him at trial on voice identification, at the very time that the District Court opened for business and should have had the petitioner presented before a judge thereof, in conformance with Rule 9(c) of F.R.Cr.P., require examination by this Court and the exercise of its supervisory powers in accordance with decisions reversing convictions where planned, unlawful, or extended custody in violation of law was condemned, and evidence secured thereby was excluded, and judgments of conviction reversed?

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 9. *Warrant or Summons upon Indictment or Information.*

(a) *Issuance.* Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment.

* * *

(c) *Execution or Service; and Return*

(1) *Execution or Service.*

* * *

* * * The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a commissioner.

STATEMENT OF THE CASE

This is the Petition for Certiorari by Mike LaJoy seeking review of the affirmance of a judgment on a verdict of guilty by a jury and a sentence to fifteen years imprisonment upon an indictment charging bank robbery and putting in jeopardy the lives of employes and customers by use of a dangerous weapon, to wit, a firearm, (Tr. 5).

For inability to print the record for lack of funds, the Court of Appeals ordered that the parties could proceed on the official transcript and record of the District Court.

A Motion to Suppress evidence was filed by the petitioner addressed, as amended, to the suppression of evidence secured by the arrest of the petitioner at his home at 5:00 A.M. on the fourth day after the bank robbery charged under the claim of process to be issued on a suppressed indictment returned late on the preceding day, and on which bail was set at fifty thousand dollars. No official reason was recorded for suppression of the indictment.

Since this Petition is concerned with events and evidence secured on the morning after return of the indictment, the petitioner states the evidence on the motion as it was described by the Government Brief in the Court of Appeals, pages 20-23, 34-37, and 38. The testimony or evidence of witness Sanders' recognition of a similarity be-

tween the voice he remembered from the holdup, and LaJoy's voice as he heard it on commands by F.B.I. agents is described in the Government Brief at page 7 thereof.

The government version of these events is adopted to avoid argument on facts and because of the inability to print the testimony.

THE TESTIMONY OF SANDERS, P. 7 GOVERNMENT BRIEF

Sanders, vice-president and cashier of the Franklin Park Bank, was standing near the switchboard area located in the vicinity of the entrance to the bank between 11:30 and 11:40 A.M. when he heard the words "Everybody down" shouted. He then turned and observed two men leap over the railing and proceed into the tellers' cages. Both were dressed in coveralls and carried boxes. The first of such men whom he observed more closely than the second was about 6 feet tall, 190 pounds, had a mask over his face, carried a bright gun, and on the side of the box he carried he noted the word "Ballentine". The first man entered the area of tellers' cages 8 and 9, the other went further on toward the back of the bank. f.r.37. Sanders then moved into an aisle, and looking directly south saw a man standing near the doors to the entrance of the bank. f.r.38. This man was about 5′ 7″ or 5′ 8″ tall, heavier than average build, wore a mask, a dark raincoat, and a medium colored hat, and was carrying a gun. This man took several steps toward Sanders until he was 5 or 6 feet away and said several times, "Down, down, all the way down" in a voice Sanders could not forget, whereupon Sanders knelt down on the floor with his head facing down towards the floor. He then heard a

voice coming from the area of the entrance of the bank shout "Time is up". When he arose, the robbers were gone. f.r.39. Sanders subsequently attended the lineup at the offices of the Federal Bureau of Investigation on September 27, 1963 and picked out the defendant LaJoy as resembling in physical stature and voice the man he observed at the door who told him to get down. f.r.40.

Sanders further stated that in the performance of his duties, he determined that the amount taken in the robbery was $43,097.00 f.r.41. Mr. Sanders did not see a fourth man. f.r.42.

It is the evidence of Sanders, who only heard LaJoy's voice at the showup (other than the similar voice during the holdup), that was sought to be suppressed. It was the only identification evidence offered against LaJoy so far as presence at the bank holdup was concerned.

The events of the arrest search and seizure, and showup insofar as LaJoy is concerned are stated as follows in the Government Brief:

DATE OF DEFENDANTS' ARRESTS (EXCEPT PATRICK SCHANG) AND THE LINEUP

The facts subsequent to the return of the indictment, which was returned by a federal Grand Jury on September 26, 1963, are based upon testimony adduced at the hearing on the defendants' Motions to Suppress.

The defendant LaJoy testified that he was asleep in his home about 4:30 A.M. on September 27, 1963, when, after being awakened by a loud knock, he arose, answered the front door and was confronted by an F.B.I. agent pointing a revolver at him, accompanied by two other agents.

The armed agent displayed his credentials and informed LaJoy he was under arrest for the robbery of the Franklin Park Bank. At the time of such entry nothing was said by any agent concerning any kind of warrant. f.r.111. LaJoy testified further that he was kept in the recreation room of his home from about 4:30 A.M. until 8:30 A.M. during which time he was questioned by one agent while others searched his home. f.r.112. LaJoy also stated that during such period of time he was never advised that he had a right or an opportunity to call an attorney, nor was he told he was under any formal criminal charges, and that just before he was taken from his home than morning by the agents he requested permission to make a telephone call, and was told by one of them whose identity he couldn't recall that "it wasn't necessary", after which he then told his wife to call his brother. f.r.113. He was then taken to the Chicago office of the F.B.I., arriving there about 9:00 A.M., where he was fingerprinted, photographed, and taken to a large washroom, where after being given coffee, he remained about 15 or 20 minutes. f.r.114. He was then taken to a large room, half of which was dark and the other half brightly lighted, and was ordered, together with a group of other men, including the defendants D'Argento and Tomaszck, to step forward, turn sideways, turn around and further ordered to repeat certain phrases. Each person in the lineup was required to do the same. He did not know who else was in the room, but he did see a maze of heads, approximately 20 to 30 people, in the darkened portion of the room. f.r.115. After this lineup, which occurred about 10:00 A.M., he was turned over to the United States Marshal, arriving in the Marshal's office about 10:30 A.M. or 11:00 A.M. f.r.116. Upon cross-

examination, LaJoy stated he did not make any request to call an attorney while he was in the FBI offices, f.r.117.

About noon he talked to his attorney, Maurice Walsh, in the Marshal's lockup, and at 2:00 P.M. that day he was brought before Judge Parsons, f.r.118. LaJoy further testified he was not questioned or interrogated by anyone after he was turned over to the United States Marshal. f.r119.

Agent Hall of the F.B.I. testified that he and two other agents without drawn guns entered the LaJoy home after being admitted by LaJoy at approximately 5:05 A.M., and that he identified himself, showed LaJoy his credentials and then Agent Ragsdale advised LaJoy they had a warrant for his arrest which he requested them to show to him. f.r.120. Agent Ragsdale then advised LaJoy he was under arrest and that the agents did not have the warrant with them as they were not required to do so and that he did not have to say anything and anything he did say could be held against him in a court of law. LaJoy was further advised he had a right to an attorney. Other agents were then admitted to the premises and Agents Hall and Ragsdale sat down with LaJoy in the recreation room while the others searched the premises for the money taken in the robbery, weapons used in the crime or which might be used to effect an escape, as well as any instruments of the crime. f.r.121. Among the items found in such search was a .38 caliber snub-nosed revolver and a rifle. f.r.122. (Neither of which the Government introduced or attempted to introduce in the trial of this cause). During such search, the defendant's wife was permitted to move freely about the house and

prepared and served her husband coffee. The defendant was also allowed to dress and use the washroom. f.r.123. The defendant, LaJoy, was taken from his home about 7:45 or 8:00 A.M. and arrived at the F.B.I. office about 8:40 or 8:45 A.M., where he was photographed, fingerprinted, allowed to use the washroom and given something to eat. The lineup was then held and after it, he was then taken to the United States Marshal's office. f.r.124.

Hall also stated that LaJoy did not at any time while at his home that morning request permission to use the telephone nor did he make such a request or ask to consult an attorney while in the F.B.I. offices that morning. f.r.125.

The facts relating to the return of the indictment, the plan to simultaneously arrest the defendants and the conduct of the lineup follow. (Such facts are based upon testimony adduced at the hearing on the Defendants' Motions to Suppress as well as testimony heard in the trial of this case):

Agent Green testified during the hearing on the Defendants' Motions to Suppress that he was the agent in charge of the investigation of the Franklin Park Bank robbery. He further stated that some time between 3:00 and 5:00 P.M. on September 26, 1963 (the day before the arrests of the defendants in their homes), he was advised by Assistant United States Attorney Donald Joyce that warrants had been issued for the arrests of the defendants pursuant to an indictment returned that day. About 5:00 P.M. a conference was held at the FBI offices at which was planned a coordinated, simultaneous arrest of all the defendants in their homes about 5:00 A.M. the next day. Present were

some, but not all, of the agents who would carry out assignments the next day effecting such arrests. Although it was intended that such arrests take place in the defendants' homes, they were to be arrested wherever found, and there were no instructions or orders given not to arrest elsewhere than in the homes, and no orders were given to make certain such arrests took place in their homes. The agents further were instructed to make a search incidental to such arrests. f.r.164. At such meeting, it was also planned that a lineup would be held which would be attended by some witnesses, in which lineup the participants would repeat the phrases used by the bank robbers. f.r.165. Green also testified that when he entered the Tomaszck home to arrest him the next day, he did not know if Tomaszck was at home, although he assumed he would be at that hour. f.r.166.

With respect to the lineup conducted on the morning of September 27, 1963 (in which the defendants La Joy, Tomaszck and Schang took part), Agent Green testified as follows: The lineup commenced about 9:57 A.M., because that was the earliest that the FBI could gather the witnesses and transport them to the FBI offices in downtown Chicago. About eighteen possible witnesses observed the lineup. Prior to their viewing the persons in the lineup, the witnesses were told they were going to observe a group of individuals. They were not told the names of the persons they would view or their backgrounds, nor that anyone was under arrest or indicted for the robbery, but were merely told the individuals they viewed would be numbered and they (the observers) should sit apart from one another and that they should not communicate with one another as their individual recollection was required. They were further told that if they recognized any of the persons

or any charateristics of the persons in the lineup in any way, they should write down on a small piece of paper the number of such person. They were also told that they would later be interviewed individually by FBI agents concerning the number or numbers of the persons they had written down. They were also told that if they wanted one of the lineup participants to repeat a movement, they were to talk to an agent without letting the other witnesses overhear, so as not to influence other witnesses' judgments or statements. The lineup was held in an ordinary large room in the FBI office which was lighted with normal hanging ceiling fluorescent lighting fixtures, the rear lights of which were turned off and the front ones turned on, in order that the people in the lineup would not be able to clearly see the witnesses attending the lineup. Because of the limited space, two separate lineups involving two different groups of witnesses were carried out in order that the witnesses might be kept separated and not be able to communicate with one another nor observe what another might put down on his or her slip of paper. Three of the eight people in the lineup were defendants, the remaining ones were FBI agents and employees. The persons in the lineup were given instructions by number, such as "Number 1, step forward," left face," etc. as to what they should do, or say. No names were used addressing the participants in the lineup. Commands which were given to a participant in the lineup, such as a command to speak louder, were given not to any one individual in the lineup but were given to all participants in the lineup. Every man in the lineup was required to make statements in order beginning with the first man on the left. Each man also stepped forward in order and repeated various phrases. All persons in the lineup did this. Commands were issued by an agent using the same tone of

voice as to each person. Some of the FBI employees were attired similarly to the defendants. It was up to each person in the lineup as to what tone of voice he would use in repeating the phrases. No one in the lineup was told to use a different inflection, though he may have been told to speak in a louder tone. Several, including an agent, were asked to repeat phrases. Some of the witnesses appearing at the lineup had previously seen pictures of some or all of the defendants appearing in the lineup. Others had not seen any pictures at all. f.r.167. When asked about the defendant Tomaszck, Green stated he was not forced to utter the words he spoke in the lineup, and to his knowledge no attorney demanded to see Tomaszck during the period the lineup was being held. Had he done so, an attorney would have been permitted to see him. The purpose of the lineup was to see if witnesses who had previously seen photographs of individuals and had made statements regarding those individuals as to the pictures shown them, could recognize such individuals given an opportunity to see them in person and also to give other witnesses a chance to state their recollection based on a view of the whole person, as well as to see if some could identify a person based on certain characteristics, including height, build, posture or walk and voice. It was not intended to get people to make identifications who really could not do so. (Tomaszck's Exhibit No. 2 is a photograph of the lineup as it was viewed by the witnesses.) f.r.168. Agent Green did not advise Assistant United States Attorney Joyce what specific action would be taken regarding the arrests of the defendants, nor advise Joyce there was going to be a lineup. It is possible that Joyce knew that witnesses were coming into the FBI office the morning of the arrests, or that they

were already there and a showup would take place, but Green does not recall if such were the case. The lineups concluded at about 10:25 A.M. f.r.169.

Donald Joyce, former Assistant United States Attorney, testified that he presented this matter to a federal Grand Jury on September 26, 1963 and they returned an indictment that day. He requested suppression of such indictment, and appeared before Judge Campbell requesting the judge to order it suppressed, which he did. Joyce assumed that bench warrants would subsequently be issued. f.r.170. The purpose of the suppressed indictment was to protect the identity of witnesses, and effect apprehension of the defendants by means of a simultaneous arrest. Although he expected a lineup to be held, he does not recall being told specifically one would be held, and the lineup did not in any way enter into his decision to present this case to a Grand Jury and obtain a suppression order and bench warrants. He assumed or was told the defendants would be arrested early on the morning of the 27th and he expected the agents would conduct searches incident to such arrests. However, there was no discussion relating to the arrest of a defendant outside his or her home, nor was any order given not to arrest outside the home. After the lineup, he was advised it had been held, and he then presented a motion to the court to lift the suppression order. f.r.171.

In the course of the trial, the following testimony was adduced, generally on cross examination, relating to the witnesses' recollection of the conduct of the lineup and the circumstances of their presence at the lineup.

Sanders testified that he received notice from Mr. Beck of a lineup on the morning of the lineup. He then went to the FBI offices. Prior to the lineup he had not seen photographs of any person in connection with the robbery.

He did not know an indictment had been returned, nor did he know who was going to be in the lineup. He observed the lineup and pursuant to instructions to write the number of the man, if he saw any similarities or anything pertaining to the holdup, he wrote down a number on a slip of paper and gave it to an agent. f.r.174.

Mrs. Sampson testified that she was driven to the lineup by an agent who came to her home in Franklin Park about 8:15 A.M. Prior to that day she had been shown pictures, including those of LaJoy, Schang, and D'Argento, by FBI agents. Each man in the lineup had a number and she was given pieces of paper to write the numbers on. These slips were then collected by an agent. f.r.175.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit, in this case, for the following reasons.

1. Issues involved in this case are pending decision by this Court in three cases where certiorari has been granted, the cases briefed, and argument had. These cases are now awaiting decision after argument and are:

No. 334 *United States* v. *Wade*
Case below, C.A.5, 358 F.2d 557
Argued February 16, 1967

No. 223 *Gilbert* v. *California*
63 A.C. 722 California Sup. Ct.
Argued February 15 and 16, 1967

No. 254 *Stovall* v. *Denno*
C.A.2 355 F.2d 731
Argued February 16, 1967

2. In addition to the issues involved in those cases, the denial and nullification of the right to make allowed bail, by failure to inform the petitioner of it, and denial of opportunity to make it, denied the Eighth Amendment right to bail, in the case at bar.

3. The practices indulged in by the prosecutor and the Federal Bureau of Investigation involving manipulation of grand jury indictment process and a suppression order, so as to enable a search and seizure in a dwelling, where no probable cause for search existed and detention of a citizen without following the command of Rule 9(c) F.R. Cr.P. resulting in creation of voice identification evidence, without which it is unlikely that the petitioner could have been convicted, require examination by this Court and exercise of sanctions under the Court's supervisory powers over the administration of justice.

ARGUMENT.

The Court of Appeals for the Seventh Circuit, in its opinion in this case, indicated that it was not impressed with the obvious flagrant disregard of Rule 9(c) F.R.Cr.P. by the prosecutor and the F.B.I.

It further appeared unconcerned as to the nature and validity of the evidence secured by illegal detention arranged by the hurried and expedient use of the grand jury to return an indictment three days after a bank robbery and while the investigation was still pending, so that the purported process which would issue upon such indictment could be used to search a defendant's home as a purported incident of arrest, and to make practical and easy the continued detention of the defendant in the indictment by keeping him so busy with interrogation, identification operations and a line-up or show-up calculated to secure voice identification, beyond the time at which he should be presented in Court for arraignment under Rule 9(c) F.R.Cr.P., if that rule was to have any benefit or protection for the accused.

Rule 9(c) F.R.Cr.P. is indeed, a nullity, if a prosecutor and the F.B.I. can so reform it as to eliminate the word "promptly" and substitute in effect "when interrogation and investigation of the accused has been completed." There would then be no purpose for the rule and it might as well be eliminated. The prosecutor and the F.B.I. would at some time present the accused in Court to face the evidence it had secured by use of his detention, and this apparently was the interpretation placed upon the rule by the Government and by the Courts below. The facts in

this case apparently were well understood by the Court of Appeals. The Court succinctly described the scheme of the prosecutor and the agents to secure evidence, (although it uses the word "plans").

At pages 3 and 4 of its slip opinion, the Seventh Circuit Court of Appeals wrote in this case:

> "F.B.I. agent Green testified he was the agent in charge of the investigation of the Franklin Park bank robbery. Between 3 p.m. and 5 p.m. on September 23, 1963, he was officially informed that warrants had been issued for the arrest of each of the defendants pursuant to an indictment which had been returned earlier that day. Plans were made by the F.B.I. for a coordinated, simultaneous arrest of all of the defendants in their homes at 5 a.m. the next day. The agents were further instructed to make a search incidental to such arrests. *Plans also were made for a lineup in which the participants would be asked to repeat certain phrases and words that had been used by the robbers during the bank robbery.*" (Emphasis supplied.)

Thus, there is squarely before this Court a situation where an F.B.I. agent, who admittedly did not have sufficient evidence for a search warrant (see Green's testimony during motion to suppress evidence), connives with the United States Attorney to secure an indictment admittedly before investigation is complete, so that an unjustified search can be made of dwellings of defendants in the night, and a detention without counsel or opportunity to make bail can be utilized to manipulate the defendant into a long interrogation at his home and an exhibition of him to suggestible witnesses in a line-up.

"Each man in the lineup *was required* to make *statements* in regular order beginning with No. 1.

> Each man stepped forward as he repeated various phrases. All of the persons in the lineup did this. *The commands* of the F.B.I. agent were in the same tone as to each person." (Emphasis supplied.) (Page 5, slip opinion.)

The "fairness" of the lineup is emphasized by the Court of Appeals, but no mention is made of the identification of F.B.I. agents as participants in the robbery or subsequent events, by witnesses who attended the lineup and testified in Court. The notes written by these witnesses showing their claimed identifications were completely destroyed. Whether this was part of the "plans" could not be established.

The return of the indictment ended the investigatorial stage of the case as to LaJoy. The accusatorial stage was definitely established, especially since his liberty was made subject to $50,000 bail on mere request of the prosecutor, but totally without showing to justify this fantastically high bail for LaJoy, who testified that he had no prior record of conviction. Considering LaJoy's family, self-owned home in a respectable suburb, business operation of a grocery business, the use of such bail, which no one could make without opportunity to negotiate with sureties, or liquidate his holdings, makes obvious that this, too, was part of the design, or the "plan(s)" to search his home in the nighttime and "require" him to exhibit himself, before he could make bail or secure an attorney.

The obvious "plan" of the Department of Justice to frustrate and avoid its obligation to inform the defendant of the amount of his bail and take him before the District Court in accordance with Rule 9(c) F.R.C.P., was carried out and his Constitutional right to bail was thus destroyed until he was produced before the district court, which did not occur until after noon.

The Court below vacillates on its finding as to when the F.B.I. finished its coercive custody. At page 8 of its opinion, the defendants are described as being turned over to the Marshal at "about thirty minutes from the time that the federal courts in Chicago were open for business," but at page 9, the turn over time appears as 10:45 or 11:00 a.m. "The lineup was held from 9:57 to 10:25 a.m." (Page 9, slip opinion.)

No matter which of these is accurate, it is still clear that at the very time that the Department of Justice had the duty under law to permit bail and to produce the defendant LaJoy in the district court, it flouted Rule 9, the Constitutional rights of the defendant, and the decisions of the Supreme Court and *commenced* its compulsory exhibition of the defendant and its compulsion of his incriminatory statements.

The Court of Appeals has given no consideration to the alternatives left to this inexperienced defendant, without counsel, at the "showup".

What would refusal to participate by the defendant have brought on? Exposure by himself, perhaps, under physical force.

Would not refusal to say the "required" words on the "command" of the prestigious F.B.I. have subjected him to some physical or oral abuse or coercion? Or when the F.B.I. agents or cooperative defendants in the line-up spoke the "commanded" and "required" words, would his refusal to obey make his guilt and identification clear to inexperienced lay witnesses who were so suggestible that some of them identified F.B.I. agents as bank robbers. (Incidentally, as far as fairness goes, a request for the written identifications made by all witnesses was met by

the statement that these original items of evidence had been destroyed by the F.B.I., in the manner that original notes of interviews by F.B.I. agents of witnesses are destroyed so as to be not available for production under 3500 T. 18 U.S.C.)

An inexperienced layman should not be schemed into such a quandary, without counsel, after having his home invaded at 5 a.m. by pretext and the obvious fright to his wife and family.

Very little is said about any attempts by the F.B.I. to secure counsel for inexperienced but indicted LaJoy. This is because no attempt was made. The formalistic words "You are entitled to a lawyer" were little comfort and certainly were contradicted by the carefully plotted activities of the agents.

No information was given him about his right to bail and no opportunity to make it was afforded. The Department of Justice apparently assumed that its use of the suppressed indictment technique gave the F.B.I. proprietorship over LaJoy until it completed its "plans" to incriminate him despite the Rule 9, and the Constitutional provisions for bail, against self-incrimination and for due process.

The Department of Justice abused the practices and processes of the District Court. If this indictment was based on adequate evidence, why the "plans" to circumvent the ordinary process of law by an indictment suppressed even from the Marshal, to whom process was finally addressed and delivered?

The similarity in issues concerning custodial exhibition for the purpose of securing evidence of voice identification between this case and the cases argued and awaiting de-

cision in this Court at this term, No. 223, *Gilbert* v. *California,* argued February 15 and 16, 1967; No. 254, *Stovall* v. *Denno,* argued February 16, 1967; and No. 334, *United States* v. *Wade,* argued February 16, 1967, may well be persuasive in the grant or denial of certiorari in this case.

However, it is urged that in addition to those issues involving interpretation of prior decisions of this Court in *Escobedo* v. *Illinois,* 378 U.S. 478; *Massiah* v. *United States,* 377 U.S. 201; and *Mallory* v. *United States,* 354 U.S. 449; there is involved in this case the question of whether the "plan" of the prosecutor and the F.B.I. to use the indictment process for the purpose of conducting a search and seizure incidental to arrest and of obtaining custody and proprietorship over an accused in a suppressed indictment so that he could not make allowed bail or have the assistance of counsel until after completion of investigation and securing of voice identification, should be permitted. It is submitted that some reason for suppression should be incorporated in the record on application so that the indictment suppressed does not merely become a tool to be substituted for reasonable cause for search and seizure.

The petitioner urges upon the Court that its supervisory powers should be exercised to stop this misuse of the grand jury processes as a substitute for probable cause for search and seizure.

CONCLUSION.

Wherefore, this Petitioner prays this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Petitioner.